

# Pepperdine Dispute Resolution Law Journal

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Volume 10

Issue 1

*Arbitrating Sports: Reflections on USADA/Landis, the  
Olympic Games, and the Future of International Sports  
Dispute Resolution*

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Article 7

12-1-2010

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### Recommended Citation

Jeffrey Benz, *Common Issues in International Sports Arbitration*, 10 Pepp. Disp. Resol. L.J. Iss. 1 (2010)  
Available at: <https://digitalcommons.pepperdine.edu/drlj/vol10/iss1/7>

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PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

# Common Issues in International Sports Arbitration

Jeffrey Benz<sup>\*</sup>

## I. INTRODUCTION

I wanted to begin by letting everyone know that I am not a representative of the World Anti-Doping Agency (WADA), nor am I with the United States Anti-Doping Agency (USADA). And, perhaps, I am the most happy to say that I am also in no way affiliated with the Landis decision. What I want to bring to this endeavor as a [Court of Arbitration for Sport (CAS)] arbitrator who has sat on probably ten to a dozen cases in the last year alone, and as a litigator who has litigated in CAS arbitrations about an equal number on behalf of all things athletes, is that it is very easy to take the extreme cases and not focus on what happens in the middle. That can cause us to miss what the range really looks like, and what is really going on in the cases that form the vast bulk of the docket of an arbitrator, and the docket of the athlete lawyers who get these cases.

There are extreme examples out there about the length of time it has taken in the past to get some of these cases resolved. Some of those issues on time have been dealt with because some of the athlete lawyers have asked for additional time, some of them have taken exceptional time because the lawyers for USADA have asked for additional time, and sometimes both

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have agreed to additional time to make those things work. There is one athlete lawyer in this crowd who went from zero to reaching a final decision on his client in about two weeks or two and a half weeks, and he got a complete exoneration for his client in that time period, which you would never think could even be possible under the last two panels' discussions of what the cases look like. So I think that if you are going to look at this field and study this field, you have to take a view of what the entire case law looks like. This is something I look at every day, or at least once a week. I am pulling CAS cases off the CAS website every day. As an arbitrator I am looking at this neat little listserv that anyone who wants to practice in this area ought to get on. It is run by a guy named Jim Ferstel, who has an automatic search engine that grabs every article from anywhere in the world that has anything to do with doping. It ranges the gamut from three police officers being caught in a closet injecting steroids into themselves, to things like whereabouts information and the use of human rights-type legislation in Europe to challenge some of those things. But I am going to try and touch on a variety of these themes in the little bit of time I have, because I think a number of interesting issues have been raised. We have had discussion so far of what it is actually like to be in the middle of these high profile cases, but I want to talk about some very specific logistics and perspectives that I think are worth hearing for those that do not actively engage in this, but would like to do more.

## II. PANEL SELECTION STRATEGY

The first thing that you have to do on behalf of an athlete is that you have to pick a panel member, and at that point you will have an opportunity to see who USADA has picked for you. It is not like you have a handful of people to pick from. There are on the order of forty CAS arbitrators or so in North America that you can select from to be your party appointed arbitrator for your case. Rich Young, I believe, used to be on that list. I am not sure if he still is, but if he is, he has recused himself from serving in cases, because I am not aware of a single case in several years. There are others on that list who have largely gotten there through title in other positions, but they are not regularly used. And so, it would behoove you to learn who your arbitrator pool is, and to pick accordingly among those people based on the criteria you think are important to the success of your case.

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### III. SPECIFIC ISSUES IN SPORTS ARBITRATION BEFORE AN INTERNATIONAL PANEL

#### A. *Fundamental Differences between Litigation and Sports Arbitration*

In advance of coming before an arbitral panel, it is important that you spend time focusing your legal issues. Typically, I think in American litigation practice the approach is to find every possible argument that you can put up and throw it up there. At the end of the day an arbitration panel is an abbreviated proceeding. It has to deal with issues in real time. As has been pointed out, oftentimes not only is an athlete's career on the line, but the pendency of time is an important factor in the outcome of that case, because there is a world championship tryout coming up in a couple of days, an Olympic trial, or a qualifying event that they have to be in. So everybody is in that situation of being under that pressure and dealing with those things. It certainly helps the panel if the lawyers come in focused on what their major issues are, rather than throwing the proverbial kitchen sink at the panel, because the panel will, at some point, dispose of all those things, and at some point they might get angry, which has happened. I think that is a difference between European practice and the practice here in these cases. I think you have to be sensitive to the fact that this is, after all, a Swiss arbitral institution. The Court of Arbitration for Sport is not a creature of American law per se. There are elements of American law practice in it. The American Arbitration Association (AAA) is certainly an American institution, but the CAS cases are viewed as the end of the line in dealing with these cases, and it is an important factor to take into your calculus as you advocate on behalf of your clients.

Another issue I believe is important is the idea of bringing motions to dismiss on substantive issues. I used to bring motions to dismiss on substantive issues all the time when I appeared in front of CAS, and I never won a single one. There is not a CAS panel that will take up a dispositive issue on a motion to dismiss without giving all sides the opportunity to have their say, or be given their day in court without the feeling that they have had a fair process. That does not mean you might not want to do it—it does not mean it is not something worthwhile to educate the panel or educate the other side about the weaknesses in their case—but it is something you should consider carefully rather than do automatically in a case.

### *B. The Logistics of an International Panel*

In administering these cases, you sometimes have to face the reality that your arbitrators are located on different continents. I have been on panels where I have had an arbitrator based in New Zealand who lives half of the year in Europe, another arbitrator in South America, and myself, comfortably ensconced here in California, and it is very much a difficult issue to administer a hearing on that basis. It is an expensive proposition for people, and sometimes you cannot get away from the need for an in-person hearing. I have also been involved in cases that have resolved themselves in a brief, or in a telephonic hearing alone, and I do not think an athlete coming out of those cases felt they were treated unfairly by that. Certainly the panel will be reluctant to do that if the athlete wants an in-person hearing. But I do think it is a viable option to consider, rather than automatically requesting an in-person hearing if you have largely legal issues that you need to be resolved, or otherwise agreed upon facts.

### *C. Researching the Differences between a Swiss and American System*

With respect to the subject matter of this area, beyond just keeping up on the CAS cases, you also need to educate yourself about certain principles of Swiss law, and other things that are going on in the Olympic Movement. When I was at the [United States Olympic Committee (USOC)], I had to administer the relationship with this dispute resolution program from the standpoint of an institution that really was looking to have disputes solved by something other than itself. I suppose that is a typical institutional approach to these things, make it somebody else's ability to solve it, and we stay out of it. From that standpoint it always bothered me that litigants before these panels sometimes cannot find the cases that they need to find. That is changing. CAS is now putting up on its website what it says are all of the decisions for last year. I happen to know it is missing at least two of mine, including one in which WADA and USADA were issued sanctions against them, but they are making an effort, and progress is being made on that. There are buckets on this authority out there for those of you that are interested. The major law schools that have clinics in this area or have a sports or Olympic-focused educational curriculum try to maintain these on a regular basis, and the regular practitioners in the field that are always appearing before these panels maintain these lists of cases. Frankly that is the easiest way to go. There are enough of these scattered around that you should be able to find them. Do not be daunted by the fact that it is hard to find. It is improving, but they are findable.

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There is a particular issue out there that has come up in several cases that people ought to be aware of. It is a principle of Swiss law that is, frankly, not that common in the U.S. system, but it is a notion of proportionality. Essentially it boils down to getting the punishment to fit the crime. It is a frequent issue that has resolved in civil law jurisdictions in a very direct way under that term, and it is often come into play now, and I am using this as an example of why you need to keep abreast in the field. The International Olympic Committee (IOC) has recently promulgated a rule that amends Rule 45 of its charter that says that if anyone commits a doping offense for which they are punished for over six months of time, they will be ineligible to participate in the next exhibition of the games. I have had that element come up as a proportionality argument in some cases. There is not a case I know of that has ruled on that. I certainly have never ruled on that, and I am not going to try to do that today, but it is an issue that goes beyond simply knowing what the cases are and having a sense for what the administrative rule making process is like within the Olympic Movement.

#### *D. Responding to Arbitrators*

Oftentimes in a proceeding you will find—and some of this is common sense but I think it bears repeating—your arbitrators will be asking you questions in a proceeding. Oftentimes they will knock you off your train of thought. It probably makes sense for you to pay attention to that, because there is a reason usually behind that madness. Either they think that you are making an incorrect argument, or perhaps they are trying to convince their fellow panel members about a position that the panel has otherwise got an issue or dispute on, or maybe they are just plain curious, but, in any event, it behooves you to not ignore that and to actually feed the fact finder what the fact finder is looking for. There is almost always a reason that.

#### IV. THE *DE NOVO* APPEAL IN CAS CASES

I think one point that has not been expressly pointed out, but is worth pointing out in light of the Landis decision, is that sometimes you have to watch out for what you wish for on an appeal. In the CAS cases to date, there have been some cases that have gone more severely against an athlete on the de novo appeal that occurs in CAS than they went in the AAA hearing. So if you think that you have been wronged in the AAA hearing, you better feel fairly confident of that when you take it up because you run this possible risk, although there are not very many of those cases. That cuts

both ways. There have been cases in which WADA and USADA and IFs have been sanctioned on appeal, for taking up a case the panel did not think should have been taken up on appeal. It really is a *de novo* process in all senses of it, but the CAS panel will often look at all the facts and circumstances procedurally to determine where the case was when they get to look at it.

## V. CONCLUSION

Beyond that, there have been a number of comments made about the procedural system that these anti-doping cases fall under. I have tried to touch on some of the key themes here and tried to point out to you that there are actually redeeming qualities to this. I will not try to paint the picture that the process is perfect. I have been involved when I was in another role, not as an arbitrator, but in an advocacy process to try to change the AAA and the CAS and the WADA rules with respect to rule making, and it is an ongoing process. I think they are light years beyond where they were when they started this process in 2001. For those that remember, in those days to advocate for a return to doping as a disciplinary proceeding, there was virtually no due process. In fact it was a relatively big deal that in the first version of the World Anti-Doping Code there was a due process checklist included that guaranteed participants a hearing, a right to cross examine witnesses and put on testimony, and do other things because in the private association of the Olympic Movement, a lot of those rights did not exist in the kind of ad hoc processes that were going on prior to approximately 2000 and 2001 for doping cases.

I will only close with a comparison. This is not a defense to the [CAS] system in any way, but about two weeks ago I actually appeared in front of the California State Athletic Commission on behalf of a trainer and a boxer in a very high profile case involving loading of gloves. For those of you that have practiced before that body, you will find that [the international sports disciplinary system] is a lot easier. I was basically given virtually no access to evidence, evidence was appearing at the hearing, and the State Attorney General—if you want something daunting from the perspective of State action, no less than the State Attorney General's office—was prosecuting my client for a rule violation. It was not a crime, but there was, for example in the opening statement, a claim for a lifetime ban when the rules expressly prohibited the Commission from being able to grant that. There were procedural issues regarding evidence that started appearing magically—MacGyver-like—at the hearing itself. There were witnesses we were told that would not be called being called, and the variety of that kind of ilk, that

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really make the point that while this has a long way to go to get itself to a perfect system, the world could be a lot worse than it currently is.



